Supreme Court, U.S.
FILED

09-306 SEP 10 2009

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CHRISTOPHER ALLEN,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Virginia prosecuted Mr. Allen for electronically pasting the faces of minors onto sexually explicit pictures of adults. In *Ashcroft v. Free Speech* Coalition, 535 U.S. 234, 242 (2002), this Court explicitly reserved the issue of First Amendment protections for such images.

Is Virginia Code § 18.2-374.1 (2003), prohibiting the production of "sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age," overbroad on its face because it reaches a substantial amount of protected speech?

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OPINIONS BELOW

The unpublished decision of the Court of Appeals of Virginia is reprinted at Pet. App. 11a. Its order denying rehearing is reprinted at Pet. App 15a. The order from the Supreme Court of Virginia denying the appeal is reprinted at Pet. 17a. Its order denying rehearing is reprinted at Pet. 18a.

JURISDICTION

The Supreme Court of Virginia entered judgment on April 28, 2009. A timely petition for rehearing was denied on June 12, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 2003 version of Virginia Code § 18.2-374.1 provides in relevant part:

> A. For the purposes of this article and Article 4

> (§ 18.2-362 et seq.) of this chapter, the term "sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.
>
> B. A person shall be guilty of a Class 5 felony who. . . 2. Produces or makes or attempts or prepares to produce or make sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age . . . .

The full text of Va. Code § 18.2-374.1 (2003) is set forth at Pet. App. 19a.

STATEMENT OF THE CASE

At trial, Virginia's evidence showed that Christopher Allen used a computer to match photographs of the heads of minor girls with photographs of the bodies of adults engaging in sexual activity, sometimes called "morphing" or "compositing." In the trial court, and on appeal, Mr. Allen consistently argued that the First Amendment does not permit a criminal conviction for the creation of sexually explicit material that does not involve sexual activity by a child in its creation, at least without a finding of obscenity. The Virginia courts rejected Mr. Allen's First Amendment claim, and he is currently serving a sentence of seventeen years for five counts of producing child pornography in violation of the version of Virginia Code § 18.2-374.1 in effect at the time of his alleged offense.

On May 22, 2006, a Fairfax County, Virginia grand jury indicted Mr. Allen on five counts of violating Va. Code § 18.2-374.1, which made it unlawful to produce "sexually explicit visual material which utilizes or has a subject a person less than eighteen years of age."

Mr. Allen timely moved the trial court to dismiss the indictment on the grounds that Va. Code § 18.2-374.1 was unconstitutionally overbroad under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and this Court's other cases. Pet. App. 1a-7a. After hearing both parties at a pretrial hearing, the

trial court denied the motion. Pet. App. 9a. The trial court "conclude[d] that the prosecution in this case involves real children who are being harmed by the use of their images in this way. And I further conclude that the statute under which Mr. Allen is being prosecuted in this case is neither over-broad or vague. So the motion is denied." Pet. App. 9a. The trial court entered an order to that effect, although the court mistakenly referenced an opinion letter it had written on an unrelated claim Mr. Allen had advanced. Pet. App. 10a.

A jury trial commenced on May 7, 2007. As predicted in the pre-trial hearing, the prosecution case consisted of evidence that Mr. Allen, a graphic designer, used a computer program to "paste" the faces of girls onto the bodies of adult women engaged in sexual activity. Mr. Allen did not distribute the photographs; a postal inspector found them on the computer in Mr. Allen's home.

The jury convicted Mr. Allen of all five counts of producing child pornography. Following a sentencing hearing, the trial court sentenced Mr. Allen to seventeen years incarceration, followed by post-release supervision and registration as a sex offender.

Mr. Allen appealed his conviction to the Court of Appeals of Virginia, presenting the question of the overbreadth of the statute. On May 7, 2008, the Court of Appeals of Virginia denied the appeal. The Court of Appeals of Virginia concluded that the statute was not overbroad because the Virginia

statute does not contain a provision that prohibits images that merely "appear to depict" children. Pet. App. 11a. The Court of Appeals of Virginia cited this Court's reservation of the morphed images issue in *Ashcroft*: "Although in *Ashcroft*, the Court did not address morphed images, the Court explicitly stated that the morphed images 'implicate the interest or real children and are in that sense closer to the images in *Ferber*.'" Pet. App. 13a.

The Court of Appeals of Virginia reasoned,

> The plain language of Virginia's child pornography statute limits its application to images that depict actual, real children. Appellant superimposed the pictures of those children – including some of his own children and some of the children he coached – onto pictures of adults engaging in sexual activity. As such, the images that appellant created in this case are indeed closer to the works discussed in *Ferber* – images that depict sexual conduct by children – and are, therefore, quite different from the virtual images at issue in *Ashcroft*. Because appellant created pornographic images using pictures of real children, the images created by appellant do not fall within the purview of the *Ashcroft* holding (i.e., the unconstitutional portions of the CPPA.) Accordingly, appellant's reliance upon *Ashcroft* in an attempt to render Code sec. 18.2-374.1 unconstitutional is misplaced, as the Virginia child pornography statute contemplates only the images of actual

children.

Pet. App. 14a.

Mr. Allen timely requested, but was denied, reconsideration by the Court of Appeals of Virginia. Pet. App. 15a. On October 29, 2008, Mr. Allen timely filed a Petition for Appeal before the Supreme Court of Virginia, raising the overbreadth issue in that Court. The Supreme Court of Virginia refused the petition on April 28, 2009, Pet. App. 17a, and denied a Petition for Rehearing on June 12, 2009. Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

This case starkly presents the question left unanswered in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002): whether the First Amendment protects images of sexual activity that depict minors, but do not involve any actual sexual activity by minors in the production process. Virginia attempted to criminalize such images by prohibiting drawings, sculptures, and other visual representations which "ha[ve] as a subject a person less than eighteen years of age." This statutory language, subsequently repealed, criminalizes an enormous amount of protected speech, and is clearly overbroad on its face.

A. This Court has not yet addressed the important question, unanswered in *Free Speech Coalition*, of whether the First Amendment protects images of sexual activity that depict minors, but do not involve sexual activity by minors in their production.

In *Free Speech Coalition*, this Court addressed the constitutionality of 18 U.S.C. § 2256(8)(B) & (D), and found that those subsections prohibited a substantial amount of protected speech. This Court explicitly noted,

> Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so

> that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.

Free Speech Coalition, 535 U.S. at 242.

Many lower courts have noted this gap in the law. *See, e.g.*, *United States v. Sims*, 428 F.3d 945, 956 n.4 (10th Cir. 2005); *United States v. Bach*, 400 F.3d 622, 631-32 (8th Cir. 2005); *United States v. Ellyson*, 326 F.3d 522, 529 n.2 (4th Cir. 2003); *State v. Coburn*, 176 P.3d 203, 222 (Ct. App. Kan. 2008); *State v. Tooley*, 872 N.E.2d 894, 903 (Ohio 2007). Indeed, the Court of Appeals of Virginia noted this Court's comments on § 2256(8)(C) in its opinion below, and relied on its *dicta* that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber*." Pet. App. 13a.

Although relatively few courts have addressed the issues presented by morphing, those few have divided. Some, like the Court of Appeals of Virginia below, have taken this Court's reference to *Ferber* to mean that the child protection rationale in *Ferber* controls the inquiry. *See, e.g.*, *Coburn*, 176 P.3d at 222-23; *Tooley*, 872 N.E.2d at 903.

The Supreme Court of New Hampshire has

taken the opposite approach, focusing on this Court's explanation that "'*Ferber*'s judgment about child pornography was based on how it was made, not on what it communicated.'" *State v. Zidel*, 940 A.2d 255, 263 (N.H. 2008) (quoting *Free Speech Coalition*, 535 U.S. at 250-51). The New Hampshire court concluded that possession of morphed sexual images depicting children is protected speech, at least until the images are distributed. *Id.* at 263-64.

In *United States v. Bach*, 400 F.3d at 629-32, the Eighth Circuit directly addressed the constitutionality of § 2256(8)(C). The case did not present "the typical morphing case in which an innocent picture of a child has been altered to appear that the child is engaging in sexually explicit conduct, for the lasciviously posed body is that of a child." 400 F.3d at 632. Because both the face and body shown in the picture belonged to minors, that court concluded, "Although there may well be instances in which the application of § 2256(8)(C) violates the First Amendment, this is not such a case." *Id.*

This Court should grant the writ to fill the gap in the law left by *Free Speech Coalition*, and resolve the confusion of the lower courts with respect to morphed images of sexual activity.

B. **Morphed images of sexual activity that depict minors, but do not involve sexual activity by minors in their production, do not fall within *Ferber*'s categorical exclusion from First Amendment protection.**

This Court's cases excluding child pornography from First Amendment protection focus on the sexual abuse of the child in the production process. In what the Eighth Circuit has called "the typical morphing case," *Bach*, 400 F.3d at 632, no child has been sexually abused in the production of the images. These images "do not involve live performance or photographic or other visual reproduction of live performances," and accordingly "retain[] First Amendment protection." *New York v. Ferber*, 458 U.S. 747, 765 (1982).

The principles of the First Amendment prohibit the government from controlling what "we can see, read, speak or hear." *Free Speech Coalition*, 435 U.S. at 245-46. However, these freedoms are not limitless. Content neutral restrictions on time, place and manner are permitted. See *Perry Ed. Assn. v. Perry Local Educator's Assn.* 460 U.S. 37, 45 (1983). Similarly, content-based restrictions are legitimate if they are narrowly tailored to serve a compelling state interest. *See, e.g., Cornelius v. NAACP LDEF*, 473 U.S. 788, 800 (1985).

Concurrently, certain types of speech do not retain any form of constitutional protection. These include defamation, *Dun v. Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), incitement to imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), obscenity, *Miller v. California*, 413 U.S. 15 (1973), and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

This Court held in *New York v. Ferber*, 458 U.S. 747, 764-66 (1982), that distribution of child pornography is one of the forms of speech categorically excluded from the First Amendment. This Court identified two major rationales for this categorical exclusion: (1) child pornography creates a permanent record of child sexual abuse; and (2) the distribution of child pornography in the marketplace provides an economic motive for additional child sexual abuse to produce more material. *Id.* at 759-63. "Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came." *Free Speech Coalition*, 535 U.S. at 250.

In *Osbourne v. Ohio*, 495 U.S. 103, 111 (1990), this Court extended the categorical ban on child pornography to mere possession. This Court stressed the harm to the child from a permanent record of his or her abuse, as well as the economic motive for production. *Id.* at 109-11.

Osbourne also noted the secondary impact of the ban on pedophiles who might use child pornography to seduce additional victims. *Id.* at 111. "The Court, however, anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.' It did not suggest that, absent this concern, other governmental interests would suffice." *Free Speech Coalition*, 535 U.S. at 250 (quoting *Osbourne*, 495 U.S. at 110).

Under *Ferber* and *Osbourne*, all depictions of sexual activity involving children are not excluded

from First Amendment protection. The Court in *Ferber* explained that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Ferber*, 458 U.S. at 765. Even without considering the reasoning in *Free Speech Coalition*, morphed images depicting sexual activity by children which do not involve sexual activity by children in their production do not implicate the core concerns of *Ferber* and *Osbourne*.

In addressing the § 2256(8)(B) ban on wholly virtual pornography, *Free Speech Coalition* held that the alleged secondary effects of explicit material depicting children are not sufficient to exclude speech from First Amendment protection absent the sexual abuse of children. This Court rejected the rationale that such images encourage pedophiles. 535 U.S. at 253. And it explained that the interest in deterring the production of child pornography could not justify a ban on wholly virtual sexual images of children because "there is no underlying crime" in its production. *Id.* at 254.

The remaining rationale for placing morphed images depicting sexual activity by children that do not involve child sexual abuse in their production beyond First Amendment protection is that "they implicate the interests of real children." *Id.* at 242; *see also, e.g., Coburn*, 176 P.3d at 222-23 ("The images, even if altered to simulate sexually explicit conduct, implicate the interests of children and could

harm their physiological, emotional, and mental health.")

While many states prohibit only the employment of children in sexually explicit material, Virginia and ten other states follow the federal example of prohibiting morphed images of minors depicting sexually explicit material, regardless of whether sexual activity by minors was involved in the production.[1]

Only this Court can determine whether the interest in protecting people from having their images used for private sexual ends is sufficiently compelling to justify banning an entire class of speech. Even if this interest is compelling, however, Virginia's statute sweeps so broadly that it does not serve this end.

C. The Virginia statute under which Mr. Allen was convicted is facially overbroad because it prohibits a substantial amount of protected speech.

At the time of Mr. Allen's acts, Va. Code §

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[1] *See* Hawaii Code 707-750(2)(b); Illinois Code 720 ICLS 5/11-20.1(f)(7); Michigan Code 145c(1)(a)(i), (1)(m), (2); Minn. Stat. 617.246(1)(f)(2)(ii); Missouri Code 573.023(2)(b)(c); New Hampshire Code 649-A:2(IV)(c) & 649-A:3-b; New Jersey Code 2C:24-4(4); New Mexico Code 30-6A-3(E); Rhode Island Code 11-9-1.3(a), (c)(1)(iii); Utah Code 76-5A-2(1), 76-5a-3(1)(a).

18.2-374.1 prohibited the production of drawing, sculpture, digital image, or other visual representation depicting nudity or sexual activity or excitement that "has as a subject a person less than eighteen years of age." Because the statute defines its prohibition by the image's subject rather than the presence of an identifiable minor, the statute prohibits all of the literature this Court identified in *Free Speech Coalition* and more.

The First Amendment "needs breathing space," and for that reason statutes attempting to restrict or burden its exercise must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A law imposing criminal penalties is, of course, a form of speech suppression, *Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977), and a defendant can attack an overly broad statute even though the conduct of the person making the attack is "clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 769. To be unconstitutional, the overbreadth of a statute must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

At the time of the events leading to Mr. Allen's conviction, Va. Code § 18.2-374.1(B)(2) prohibited the production of "sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age." Virginia Code §

18.2-374.1(A), in turn, defined "sexually explicit visual material" as "a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation" which depicts specified sexual conduct.

The statute prohibits all sexually explicit drawings, sculptures, pictures, films, and digital images that have a person under eighteen "as a subject." What this Court said of § 2256(8)(B) is even more true of § 18.2-374.1(B)(2): "This statute proscribes the visual depiction of an idea – that of teenagers engaging in sexual activity – that is a fact of modern society and has been a theme in art and literature throughout the ages." *Free Speech Coalition*, 535 U.S. at 246. This Court noted that there are hundreds of films "that explore those *subjects*," and deplored the possibility that one which included a graphic scene would be punished without inquiry into its redeeming value. *Id.* at 248 (emphasis added).

Virginia's statute is worse than § 2256(8)(B). Under Virginia's scheme, the subject of under-18 sexuality is not an incidental casualty of the ban on speech, but rather it is the subject of a minor engaged in sexual activity itself that constitutes the crime. Because it regulates the subject of the work rather than the age of the actors, Virginia's reaches even the young-looking actors which *Ferber* identified as an alternative and permissible means of expression. *See Free Speech Coalition*, 535 U.S. at 251; *Ferber*, 458 U.S. at 763.

Consider Vladimir Nabokov's 1955 novel *Lolita*, fourth on the Modern Library's list of the 100 Best Novels of the Twentieth Century. *Lolita* has been filmed twice, in 1962 by Stanley Kubrick and again in 1997 by Adrian Lyne. In *Lolita*, twelve-year-old Dolores Haze is seduced by a neurotic European improbably named Humbert Humbert, then leaves Humbert for playwright and pedophile Clare Quilty. *Lolita* "has as a subject a person less than eighteen years of age," regardless of the age of the actress playing Dolores. As a matter of fact, both actresses playing Dolores (Sue Lyon and Dominique Swain) were under eighteen at the time their respective versions of *Lolita* were filmed. If such a film showed, even for an instant, "the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple" or "covered . . . male genitals in a discernibly turgid state," Va. Code § 18.2-390, the cast and crew would have produced child pornography under Virginia's statute.

Even if the psychological harm to a child from their depiction in sexually explicit material justifies exclusion of morphed images from First Amendment protection, Virginia's statute is not tailored to serve that end. Title 18 U.S.C. § 2256(8)(C), like some state statutes, prohibits modifying an image "to appear that an identifiable minor is engaging in sexually explicit conduct." *See Bach*, 400 F.3d at 631 (discussing "identifiable minor" requirement). The version of § 18.2-374.1 under which Mr. Allen was

convicted has no such requirement;[2] the statute permits conviction whether or not a minor could identify him- or herself in a visual depiction.

Furthermore, the facts of this case demonstrate the tenuous link between the statute and the psychological harm some courts have suggested. At trial, the prosecution demonstrated that Mr. Allen had morphed images of sexual activity on his computer, but introduced no evidence that he ever distributed the images or showed them to any other person. In fact, the detective who investigated the case found no evidence that the images were distributed, printed, or emailed.

Like the indirect harms suggested by the government in *Free Speech Coalition*, 535 U.S. at 250, the psychological harm from a person viewing him- or herself in a morphed image is contingent on another act: distribution. *See Zidel*, 940 A.2d at 263. The images on Mr. Allen's computer could not harm the minors portrayed because neither the minors nor the general public ever saw them. Even if, therefore, this Court considers the interest in prevent psychological harm through exposure to morphed images to be weighty, this case demonstrates that the purported interest is not necessarily furthered by Virginia's statute.

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[2] Virginia's current version of Code § 18.2-374.1 does contain an "identifiable minor" requirement. *See* Va. Code § 18.2-374.1 (2009).

For these reasons, Mr. Allen respectfully requests that this Court grant his Petition for Writ of Certiorari to address this important question, left unaddressed in *Free Speech Coalition.*

Respectfully submitted,

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APPENDIX

Appendix A

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	) CRIMINAL NUMBER) FE-2006-663
v.	)
CHRISTOPHER H. ALLEN Defendant	)

MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW, the Defendant, Christopher Allen, and files this memorandum of points and authorities in support of his motion to dismiss the indictment against him. The defendant asserts that it is legally impossible for him to be convicted of the crime charged and that the statute is unconstitutionally overbroad and vague in violation of the U.S. and Virginia Constitutions.

FACTUAL BACKGROUND

Christopher Allen was indicted by the Commonwealth on five counts of producing child pornography in violation of Va. Code Ann. § 18.2-374.1. The assistant Commonwealth's Attorney has provided counsel with discovery showing that it intends to prosecute the defendant for "producing" child pornography images by "morphing," that is, digitally combining images of adults engaged in sexual activity with an image of a child's face, so that it appears that the child is engaged in the sex act. In the defendant's case, the original images of the children were innocent photographs that did not involve any sexual activity or implied sexual activity. Additionally, it is not alleged that the defendant did distribute, share, sell, give away, electronically transmit, or display the morphed images in any way. To this day, the children whose images were used are not aware of that fact.

* * *

OVERBREADTH

A law is unconstitutionally overbroad if it regulates substantially more speech that the Constitution allows to be regulated and persons to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others. Commonwealth v. Simone, 63 Va. Cir. 216 (2003)(quoting Erwin Cherminsky, *Constitutional*

Law, 894, 921 (2001)). In our case, if Va. Code Ann. § 18.2-374.1 can be read to apply to a situation where an image is used to create the illusion a child is involved in sexual activity, and that image is no way distributed, then it would also apply to mere possession of virtual child pornography, which the Supreme Court ruled was protected speech in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). In Ashcroft, the Supreme Court found that the federal statute at issue, the Child Pornography Protection Act (the "CPPA"), would proscribe the visual depiction of an idea and ruled that the statute was overbroad. Id, at 246. The Virginia statute could be read to apply to virtual child pornography just as readily as to morphed child pornography. If a defendant were to create a sexually explicit sculpture and used the features of a known minor without having that minor model (and told law enforcement that he were doing so), then he could be prosecuted for having utilized or had as a subject a person less than eighteen. But, as the Ashcroft court states, the Virginia statute would then prohibit speech that records no crime and creates no victims by its production. Id, at 250. This type of pornography is not "intrinsically related" to the sexual abuse of children. See New York v. Ferber, 458 U.S. 747, 759 (1982). The government may assert that these types of images can lead to actual

instances of child abuse, "but the casual link is contingent and indirect." Ashcroft at 250.

An earlier Supreme Court case dealt with the question of whether a statute could prohibit persons from knowingly promoting sexual performances by children by distributing material which depicts such performances. In its decision in New York v. Ferber, 458 U.S. 747 (1982), the Supreme Court focused on laws which were dissemination of child pornography, and not a situation like ours where pornography is created without the knowledge or any specific harm to an actual child. In determining if the States were entitled to regulate speech that involved child pornography the court in Ferber articulated five basic reasons for reaching the conclusion that it was permissible. However, Virginia's statute, as interpreted and applied by the Commonwealth in our case, does not satisfy the Ferber analysis. First, the Ferber court ruled that a state's interest in safeguarding the physical and psychological well being of a minor was compelling. However, in our case, the government is attempting to apply the statute in a situation where no child's physical or psychological well-being is in danger. The argument that a child could be harmed by the conduct in our case returns us to the Ashcroft conclusion that the casual link to such harm is contingent and indirect. Second, the court in Ferber found that "the

distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in two ways ...[f]irst, the materials produced are a permanent of the children's participation and the harm to the child is exacerbated by their circulation...[and][s]econd, the distribution network for child pornography must be closed..." Id, at 759. This reasoning does not apply in our case because there is simply not an issue of distribution. No child was harmed because there was no circulation. The pictures in our case were not part of the distribution network. Further, as the Ashcroft Court stated, "the harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." Ashcroft, 535 U.S. at 250. The third reason the Ferber Court enumerated as a compelling justification for regulation by the state was that the advertising and selling of child pornography provide an economic motive for the production of child pornography. Ferber, 458 U.S. at 761. Again, in our case, advertising and selling is not an issue. There was no distribution or intended distribution, so this cannot be used as a justification to regulate the behavior in our case. The fourth reason was that the "value of permitting live performance and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest..." Id, at 762. Our case does not involve permitting live

performances or photographic reproductions (the end product in our case our originals), and, again, no child is actually involved in any sex act. The Ferber Court went on to say that "[s]imulation outside of the prohibition of the statute could" be permissible. Id. The Ferber court alluded to exactly what the defendant in this case did – simulated a child having sex, and suggested it should not be prohibited. Finally, the Ferber court stated that "classification of child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions." However, classifying what the defendant in this case did as being prohibited child pornography is incompatible with later decision after Ferber, specifically the Ashcroft case.

A Virginia circuit court judge recently considered the question whether Virginia's statute criminalizing *possession* of child pornography is constitutional when it is applied to morphed images and determined that it was. See Commonwealth v. Simone, 63 Va. Cir. 216 (2003). The conclusion in that case does not apply to our case because that court addressed the issue of simple possession of child pornography, rather than the higher level offense of producing child pornography. Nevertheless, some of the logic and analysis in that case is applicable here. For example, the Simone

judge reasons that the first premise of Ferber is satisfied because the judge imagines situations where innocent images can be altered, and then summarily concludes that it cannot be doubted that the child in the image would be damaged physiologically, emotionally and/or mentally. Id. at pg. 20. However, thus conclusion can be reached only if the child or others were somehow made aware that the image had been created. But for this to be the case it requires a "casual link that is contingent and indirect." Ashcroft, 535 U.S. at 250. "The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." Id. For the child to be harmed under the Simone judge's imaginary situation, the morphed image must be distributed or displayed in some way for the child and others to be aware of it, and thus harmed, which itself would be a subsequent criminal act. The mere creation of the image does not harm the child. In any event, counsel notes that the Court of Appeals overturned the judge's conviction in that case, ruling it was not based upon sufficient evidence and therefore, the Court of Appeals did not address the judge's legal findings. Simone v. Commonwealth, Record No.0551 04-1 (Va. Ct. App. 2005).

* * *

Appendix B

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL DOCKET NO 2006-0663
vs.	:	
CHRISTOPHER ALLEN	:	
Defendant.	:	

Circuit Courtroom 5G
Fairfax County Courthouse
Fairfax, Virginia
Friday, April 27, 2007

The above-entitled matter came on to be heard before THE HONORABLE LESLIE M. ALDEN, JUDGE, in and for the Circuit Court of Fairfax County, in the Courthouse, Fairfax, Virginia, beginning at 11:40 o'clock a.m..

APPEARANCES:

On Behalf of the Commonwealth:
MARK J. SULLIVAN, ESQUIRE

Assistant Commonwealth's Attorney
On Behalf of the Defendant:
ROBERT C. WHITESTONE, ESQUIRE
TED G. SIBERT, ESQUIRE

***

THE COURT: All right, thank you, Mr. Whitestone. Well, let me take up the second argument first: the Defendant's motion to dismiss the indictment on the basis of legal impossibility and unconstitutionality of the statute.

For the reasons, really, that Mr. Sullivan has argued, I conclude that legal impossibility is just not an issue here because this involves real children.

And I also conclude that the prosecution in this case involves real children who are being harmed by the use of their images in this way.

And I further conclude that the statute under which Mr. Allen is being prosecuted in this case is neither over-broad or vague.

So that motion is denied.

Appendix C

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	CRIMINAL NUMBER FE-2006-663
VERSUS	INDICTMENT --- MANUFACTURING
CHRISTOPHER ALLEN	SEXUALLY EXPLICIT MATERIAL (5 COUNTS)

This matter came before the Court on April 27, 2007, on the Defendant's motion to dismiss the indictment as unconstitutional.

For the reasons stated in this Court's Opinion Letter dated May 3, 2007, which is attached hereto and made part hereof, the motion is **denied**.

_____

JUDGE LESLIE M. ALDEN
3 May 2007

Appendix D

Court of Appeals of Virginia.
Christopher Allen
vs.
Commonwealth of Virginia
Record No. 2045-07-4
Circuit Court No. FE-2006-663

May 7, 2008

From the Circuit Court of Fairfax Country
Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

* * *

IV. Appellant contend that Code § 18.2-374.1,[1] which prohibits the possession of child pornography,

---

[1] As discussed in Section I of this order, Code § 18.2-374.1 was amended in 2007. Therefore, the analysis

is unconstitutionally overbroad and vague. He relies upon Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), in support of that argument.

In Ashcroft, the United States Supreme Court found portions of the Child Pornography Prevention Act of 1996 (CPPA) unconstitutional. The portions of the CPPA that the Ashcroft Court found unconstitutional "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." 535 U.S. at 239. By extending the child pornography ban to images that only appear to depict minors, the Court noted that CPPA went "beyond New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process." Ashcroft, 535 U.S. at 240. Importantly, the Virginia statute at issue here does not contain a provision, as did the CPPA, that prohibits images that merely "appear to depict" children.

In Ferber,

> the Supreme Court noted that while child pornography material are not protected by the first amendment, legislation dealing with child pornography must adequately define the prohibited conduct in order to avoid

---

that follows contemplates the version of that statute in place prior to the amendments.

> being unconstitutional. The Court held that offenses must be limited "to work that *visually* depict sexual conduct by children below a specified age," and "[t]he category of 'sexual conduct' proscribed must also be suitably limited and described."

Foster v. Commonwealth, 6 Va. App. 313, 324-25, 369 S.E.2d 699, 695 (1988)(quoting Ferber, 459 U.S. at 764)(emphasis in original). "Ferber's judgment about child pornography was based upon how it was made, not on what it communicated." Ashcroft, 535 U.S. at 250-51.

While Ashcroft dealt with pornographic images created without involvement of real children, the images at issue in this case were produced using photographs of real children. The photographs, which depicted the heads and faces of real children, were layered by appellant, or "morphed," on top of images of adults engaging in sexual activity. The resulting images, therefore, showed a child's head superimposed on an adult engaged in sexual acts. Stated another way, morphed images, such as the images appellant produced, result from instances where "pornographers [ ] alter innocent pictures of real children so that the children appear to be engaged in sexual activity." Id. at 242. Although morphed images were not at issue in Ashcroft, the Court explicitly stated that morphed images "implicate the interests of real children and are in that sense closer to the images in Ferber." Id.

The plain language of Virginia's child pornography statute limits its application to images that depict actual, real children. The images at issue here depicted the heads and faces of actual, real, children. Appellant superimposed the pictures of those children – including some of his own children and some of the children he coached – onto pictures of adults engaging in sexual activity. As such, the images that appellant created in this case are indeed closer to the works discussed in Ferber – images that depict sexual conduct by children – and are, therefore, quite different from the virtual images at issue in Ashcroft. Because appellant created pornographic images using pictures of real children, the images created by appellant do not fall within the purview of the Ashcroft holding (i.e., the unconstitutional portions of CPPA). Accordingly, appellant's reliance upon Ashcroft in an attempt to render Code § 18.2-374.1 unconstitutional is misplaced, as the Virginia child pornography statute contemplates only the images of actual children.

* * *

Appendix E

Court of Appeals of Virginia.
Christopher Allen
vs.
Commonwealth of Virginia
Record No. 2045-07-4
Circuit Court No. FE-2006-663

September 29, 2008

From the Circuit Court of Fairfax Country
Before Judge Haley, Senior Judge Bumgardner and Retired Judge Swersky*

For the reasons previously stated in the ordered entered by this Court on May 7, 2008, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

---

*Retired Judge Alfred D. Swersky took part in the consideration of this case by designation pursuant to Code § 17.1-400(D).

A Copy,
Teste:
Cynthia L. McCoy, Clerk

By:

Deputy Clerk

Appendix F

Supreme Court of Virginia.
Christopher Allen
vs.
Commonwealth of Virginia
Record No. 082110
Court of Appeals No. 2045-07-04

April 28, 2009

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:
Patricia L. Harrington, Clerk

By:
Deputy Clerk

Appendix G

Supreme Court of Virginia.
Christopher Allen
vs.
Commonwealth of Virginia
Record No. 082110
Court of Appeals No. 2045-07-04

June 12, 2009

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 28th day of April, 2009 and grant a rehearing therof, the prayer of the said petition is denied.

A Copy,
Teste:
Patricia L. Harrington, Clerk

By:
Deputy Clerk

Appendix H

STATUTORY PROVISIONS INVOLVED

Va. Code § 18.2-374.1. (2003)

Production, publication, sale, possession with intent to distribute, financing, etc., of sexually explicit items involving children; presumption as to age; severability.

A. For the purposes of this article and Article 4 (§ 18.2-362 et seq.) of this chapter, the term "*sexually explicit visual material*" means a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

B. A person shall be guilty of a Class 5 felony who:

1. Accosts, entices or solicits a person less than eighteen years of age with intent to induce or force

such person to perform in or be a subject of sexually explicit visual material; or

2. Produces or makes or attempts or prepares to produce or make sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age; or

3. Who knowingly takes part in or participates in the filming, photographing or other reproduction of sexually explicit visual material by any means, including but not limited to computer-generated reproduction, which utilizes or has as a subject a person less than eighteen years of age; or

4. Sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit or display with lascivious intent sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.

5. [Repealed.]

B1. [Repealed.]

C. A person shall be guilty of a Class 4 felony who knowingly finances or attempts or prepares to finance sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.

D. For the purposes of this section a person who is depicted as or presents the appearance of being less than eighteen years of age in sexually explicit visual material is prima facie presumed to be less than eighteen years of age.

E. The provisions of this section shall be severable and, if any of its provisions shall be held unconstitutional by a court of competent jurisdiction, then the decision of such court shall not affect or impair any of the remaining provisions.

Va. Code § 18.2-390. (2003)

Definitions.

As used in this article:

(1) "Juvenile" means a person less than 18 years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a

mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

(8) "Video or computer game" means an object or device that stores recorded data or instructions, receives data or instructions generated by a person who uses it, and, by processing the data or instructions, creates an interactive game capable of being played, viewed, or experienced on or through a

computer, television gaming system, console, or other technology.

No. 09-306

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRISTOPHER H. ALLEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, Christopher H. Allen, created sexually explicit images by morphing the heads and faces of actual, identifiable children with images of adult bodies engaged in sexual activity. Allen claims the First Amendment protects the resulting images. The questions presented are:

1. Does the First Amendment protect sexually explicit images created by morphing the heads and faces of actual, identifiable children with images of adult bodies?

2. When the state courts have construed a state statute as applying only to child pornography that depicts actual children, is that statute substantially overbroad and, thus, facially unconstitutional?

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ACTS OF ASSEMBLY

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Virginia Attorney General William C. Mims, on behalf of the Commonwealth of Virginia, and pursuant to this Court's Order of October 5, 2009, submits this Response to the Petition for Certiorari.[1]

INTRODUCTION

The First Amendment does not protect *actual* child pornography, *New York v. Ferber*, 458 U.S. 747, 756-58 (1982), but it does protect *virtual* child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51 (2002). However, the line between virtual and real child pornography blurs when pornographers morph the images of real children with the images of real adults or computer generated images. *Id.* at 242. "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Id.*

The Petition asks this Court to decide the constitutionality of possessing sexually explicit morphed images involving actual, identifiable children. The Petitioner, Christopher H. Allen, altered "innocent pictures of real children so that the children appear to be engaged in sexual activity." *Id.* Specifically, he "superimposed the pictures of those children—including some of his own children and

[1] On October 13, 2009, this Court extended the time for filing a response to December 4, 2009.

some of the children that he coached—onto pictures of adults engaged in sexual activity." *Pet. App.* 14a. Allen was convicted of producing, but not distributing, child pornography in violation of *Virginia Code* § 18.2-374.1(B)(2) ("Virginia Act").[2] He now claims that his production of these sexually explicit morphed images is constitutionally protected and the Virginia Act is substantially overbroad and, thus, facially unconstitutional.

This Court should deny review. With one exception, every appellate court to address the possession of sexually explicit morphed images involving actual, identifiable children concluded that the images are constitutionally unprotected. While there is a conflict among the lower appellate courts, this Court should not grant review simply because of one outlier decision.

Moreover, as construed by the Virginia courts, the Virginia Act is limited in "its application to images that depict actual, real, children." *Pet. App.* 14a. The Constitution does not protect such images, *Ferber*, 458 U.S. at 756-58, and, even if there are unconstitutional applications, the statute is not substantially overbroad. Thus, this Court should deny review of the overbreadth issue.

---

[2] The statute was substantially rewritten in 2007 and those changes went into effect after Allen was convicted. 2007 Va. Acts chs. 759, 823.

STATEMENT OF THE CASE

1. In many respects, Allen was the typical suburbanite. He operated a computer based graphic design business out of his home, cared for his niece on nights when his sister-in-law worked the night shift, and coached his stepdaughter's soccer team in a league for girls under ten years of age. Yet, there was a darker side to Allen. Using computer technology, he took the faces of his stepdaughter, his niece, and several girls on the soccer team from innocent photographs and combined or "morphed" them with pictures of adults engaged in sexually explicit acts.[3] The photographs are extremely graphic. For example, using a photograph depicting a girl with her mouth open, eating a slice of watermelon, Allen digitally removed the watermelon slice and replaced it with an erect penis. The girls depicted in the resulting morphed photographs were around seven-years-old at the time these photographs were created.[4] The children are readily identifiable in the images. *See* Trial Transcript of May 7, 2007 at 187 (soccer player), 194-95 (soccer player), 199-200 (soccer player), 205 (niece), 206 (stepdaughter), *Virginia v. Allen*, No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

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[3] Allen also morphed images of the head and face of his sister-in-law onto the bodies of adults engaged in sexual acts. *See* Trial Transcript of May 7, 2007 at 206, *Virginia v. Allen*, No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

[4] *See* Trial Transcript of May 7, 2007 at 90, 186, 193-94, 199, 204, 213, *Virginia v. Allen*, No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

Acting on a tip from Allen's wife, federal postal inspectors and the local police executed a search warrant and seized computers containing the morphed images. Allen was indicted by a federal grand jury for two counts of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). He ultimately pled guilty to one count and received a sentence of forty-one months in federal prison.

2. While Allen was in federal custody, a state grand jury indicted him for five counts of producing child pornography in violation of the Virginia Act.

Allen moved to dismiss the state indictment on First Amendment grounds. Although Allen framed his request exclusively in overbreadth terms, a careful examination of his argument reveals that he was making *both* an as-applied challenge and a facial challenge alleging overbreadth. *Pet. App.* 2a-7a. *See also* Petition for Appeal at 13-17, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008). The as-applied challenge emphasized that Allen never distributed the sexually explicit morphed images. *Pet. App.* 5a-7a. *See also* Petition for Appeal at 15-17, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008). The facial challenge alleging overbreadth argued that the Virginia Act "could be read to apply to virtual child pornography just as readily as to morphed child pornography." *Pet. App.* 3a. *See also* Petition for Appeal at 14-15, *Allen v. Virginia*, No. 2045-7-04 (Va. Ct. App. 2008).

In denying the motion, *Pet. App.* 10a, the trial court concluded, "the prosecution in this case involves real children who are being harmed by the use of their images in this way" and "the statute under which Mr. Allen is being prosecuted is neither over-broad or vague." *Pet. App.* 9a. Thus, the Virginia Act is constitutional as applied to Allen and is not substantially overbroad.

Following a two-day trial, a jury convicted Allen on all five counts. The trial court sentenced him to twenty-four years in prison, seven of which is suspended, and required Allen to register as a sex offender following his release.

3. Virginia's intermediate appellate court refused Allen's appeal. *Pet. App.* 11a-14a. In rejecting the appeal, the court distinguished the images produced by Allen from the images at issue in *Ashcroft*. As the court explained:

> While *Ashcroft* dealt with pornographic images created without involvement of real children, the images at issue in this case were produced using photographs of real children. The photographs, which depicted the heads and faces of real children, were layered by appellant or "morphed," on top of images of adults engaged in sexual activity. The resulting images, therefore, showed a child's head superimposed on an adult engaged in sexual acts. Stated another way, morphed images, such as the images appellant produced, result from instances

> where "pornographers [ ] alter innocent pictures of real children so the children appear to be engaged in sexual activity." Although morphed images were not at issue in *Ashcroft*, the Court explicitly stated that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber*."

Pet. App. 13a (citations omitted, bracket original). Since Allen "created pornographic images using pictures of real children, the images created by [Allen] do not fall within the purview of the *Ashcroft* holding." *Pet. App.* 14a. Thus, the Virginia Act is constitutional as applied to Allen and it is not substantially overbroad.

Allen sought rehearing of the denial of his appeal and the Court of Appeals of Virginia declined the request. *Pet. App.* 15a.

4. The Supreme Court of Virginia refused Allen's appeal on April 28, 2009. *Pet. App.* 17a. The court denied Allen's request for rehearing on June 12, 2009. *Pet. App.* 18a. Under Virginia law, such a denial by the Supreme Court of Virginia is a decision on the merits. *See Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002).

The Petition for Certiorari followed.

REASONS FOR DENYING THE PETITION

First, this Court should not decide the constitutionality of possessing sexually explicit morphed images of actual, identifiable children. The few courts that have addressed this issue are largely in agreement, with only one outlier court disagreeing with the Virginia courts. Moreover, there is no constitutional right to possess sexually explicit morphed images of actual, identifiable children.

Second, this Court should deny review of the overbreadth challenge to the Virginia Act. As construed by the Virginia courts, the Virginia Act is limited to child pornography involving actual children. Because there is no constitutional right to possess child pornography involving actual children, the Virginia Act has no unconstitutional applications. However, even if there are unconstitutional applications, the Virginia Act is not substantially overbroad.

I. THIS COURT SHOULD NOT DECIDE THE CONSTITUTIONALITY OF POSSESSING SEXUALLY EXPLICIT MORPHED IMAGES OF ACTUAL, IDENTIFIABLE CHILDREN.

A. The Conflict Among The Lower Courts Is Shallow.

Few courts have addressed the constitutionality of possessing sexually explicit morphed images of actual, identifiable children. Other than the lower court, only four appellate courts have addressed it.

Like the Virginia appellate courts, Ohio's highest court and Kansas' intermediate appellate court hold that the Constitution does not protect sexually explicit morphed images involving actual children. *See Ohio v. Tooley*, 872 N.E.2d 894, 903 (Ohio 2007), *cert. denied,* 552 U.S. 1115 (2008); *Kansas v. Coburn*, 176 P.3d 203, 222-23 (Kan. Ct. App. 2008). The Eighth Circuit, while acknowledging that the Constitution might protect *some* morphed images, held that the First Amendment does not protect the morphed image when the child is identifiable.[5] *United States v. Bach,* 400 F.3d 622, 632 (8th Cir. 2005). Conversely, the Supreme Court of New Hampshire held that government could not criminalize the mere *possession* of morphed images "where the naked bodies do not depict body parts of actual children engaging in sexual activity." *New Hampshire v. Zidel*, 940 A.2d 255, 263 (N.H. 2008). However, the New Hampshire court suggested that the *distribution* of such morphed images "may be harmful to the depicted child." *Id.*

Aside from the outlier *Zidel* decision, there is substantial agreement among the lower courts with respect to the lack of First Amendment protection of a right to possess sexually explicit morphed images

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[5] If the question of the child being identifiable is constitutionally significant, it is not at issue in this case. All of Allen's victims are identifiable in the morphed images. *See* Trial Transcript of May 7, 2007 at 187, 194-95, 199-200, 205, 206, *Virginia v. Allen*, No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

involving actual, identifiable children. Quite simply, "the holding of *Zidel* is at odds with every other federal and state court which has confronted, even indirectly, the constitutional question raised by the dicta in *Ashcroft* concerning statutes which impose criminal penalties for possession of morphed images of child pornography." *United States v. Hotaling*, 599 F. Supp. 2d 306, 319 (N.D. N.Y. 2008).[6] This Court need not grant review simply because of one outlier decision, which reviewed a statute with narrow purpose. Rather, this Court should grant review only if other courts follow *Zidel*.

Moreover, the specific purpose of the New Hampshire statute at issue in *Zidel* was to stop the "use [of children] *as subjects* in sexual performances." 940 A.2d at 262 (emphasis added). The court observed that this interest was not served when the photographs did not depict children involved in sexual activity. *Id.* at 263. This narrow purpose helps to explain the ruling of the New Hampshire court. In contrast, although the Virginia Act does not contain an express declaration of purpose, "[t]he legislative enactment of the possession statute clearly reflects the decision of the General Assembly to protect Virginia 'children from treatment it

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[6] Other courts have rejected the argument that the First Amendment protects possession of morphed images of actual children engaged in sexual activity. *Cobb v. Coplan*, 2003 WL 22888857, at *7-8 (D. N.H. 2003) (federal habeas review); *Maine v. Monahan*, 2003 WL 1666665, at *1-2 (Me. Super. Ct. 2003).

determines is physically or psychologically injurious to youth.'" *Virginia v. Simone*, 63 Va. Cir. 216, 239 (Va. Portsmouth Cir. Ct. 2003), *rev'd on other grounds* at *Simone v. Commonwealth*, No. 0551-04-1, 2005 WL 588257 (Va. Ct. App. March 15, 2005) (quoting *Freeman v. Virginia*, 288 S.E.2d 461, 465 (Va. 1982)). Unquestionably, a child whose image is used in sexually explicit images can be psychologically scarred from such images, and the best way to prevent the images from being disseminated is to prohibit the creation of such images.

B. There Is No Right To Possess Sexually Explicit Morphed Images Involving Actual, Identifiable Children.

This Court's review is unwarranted because the Virginia courts faithfully and correctly applied this Court's First Amendment jurisprudence. The Virginia Act is constitutional as applied to Allen. There is no constitutional right to possess morphed images involving actual, identifiable children. Therefore, the prosecution of Allen for producing, but not distributing, such images is constitutional.

First, "the creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not 'protected expressive activity' under the Constitution." *Hotaling*, 599 F. Supp. 2d at 321. While such images might not meet the traditional definition of "obscene" articulated in *Miller v. California*, 413 U.S. 15, 24 (1973), "the

States are entitled to greater leeway in the regulation of pornographic depictions of children." *Ferber*, 458 U.S. at 756. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982)). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, the States may constitutionally proscribe not only actual child pornography, *Ferber*, 458 U.S. at 756-58, but "any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008).

Second, there is no constitutional right to possess sexually explicit morphed images involving actual, identifiable children. The government may criminalize the distribution of obscene materials, *see Miller*, 413 U.S. at 24, but may not criminalize the mere possession of obscene materials. *See Stanley v. Georgia*, 394 U.S. 557, 567 (1969). However, the rule is different for actual child pornography. There is no constitutional right to distribute, *Ferber*, 458 U.S. at 756-58, or to possess actual child pornography. *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990).

Contrary to Allen's suggestions, *Pet.* 11-13, the *Osborne* rationale is equally applicable to sexually explicit morphed images involving actual, identifiable children. Like actual child pornography, the

constitutional value of a sexually explicit morphed image is "exceedingly modest, if not *de minimis*." *Ferber*, 458 U.S. at 762. By prohibiting the possession of such images, Virginia seeks "to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *Osborne*, 495 U.S. at 109. It is "surely reasonable for the State to conclude that it will decrease the *production* of child pornography if it penalizes those who [merely] *possess* and view the product, thereby decreasing demand." *Id.* at 109-10 (emphasis added). Similarly, it is logical for Virginia to conclude that it will decrease the production of sexually explicit morphed images involving actual, identifiable children if it criminalizes the possession of such images.

To be sure, the harm to children from the production of sexually explicit morphed images is less than the harm to children in the production of actual child pornography. Yet, that lesser degree harm to the child does not alter the constitutional analysis.[7] When sexually explicit morphed images involve actual, identifiable children, "a lasting record has been created of . . . an identifiable minor child, seemingly engaged in sexually explicit activity. [The child] is thus victimized every time the picture is displayed." *Bach*, 400 F.3d at 632. Furthermore, storing the images creates a likelihood that the images will

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[7] Moreover, the fact that the victims may be unaware that they are victims is irrelevant. The crime is producing the image, not communicating the image.

be discovered and shared with others, thereby traumatizing the identifiable children depicted in the images.

Indeed, that is exactly what happened here. The parents of one of the girls depicted in the morphed images felt compelled to tell their daughter about it, although without showing her the actual photograph. Upon learning of what happened, their young daughter "was very disturbed by it and she sobbed uncontrollably." *See* Trial Transcript of May 8, 2007 at 154, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007). Another parent described her teenage daughter as "very angry" and "very disturbed" upon learning about the photo and testified that "this deeply affected her and it has affected our entire family." *See* Trial Transcript of May 8, 2007 at 157, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007). The mother of another girl related that her daughter had to go through counseling, does not trust men at all, and even tried to take her own life. She testified that the incident "forever changed the makeup of our family, not just my children and myself, but all of our family." *See* Trial Transcript of May 8, 2007 at 160, *Virginia v. Allen,* No. 2006-663 (Va. Fairfax Cir. Ct. 2007).

The presence of an identifiable victim distinguishes the sexually explicit morphed images from virtual child pornography and actual adult pornography using actors who appear to be children. *Bach*, 400 F.3d at 632. Such morphed "images 'implicate the interests of real children' and are

'closer' to the types of images placed outside the protection of the First Amendment in *Ferber*." *Hotaling*, 599 F. Supp. 2d at 321 (quoting *Ashcroft*, 535 U.S. at 242, 254).

II. THIS COURT SHOULD DENY REVIEW OF THE OVERBREADTH CHALLENGE TO THE VIRGINIA ACT.

Although the Virginia Act is constitutional as applied to Allen, he may still pursue a facial challenge alleging overbreadth.[8] *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (facial challenges alleging overbreadth available in some limited contexts). In a facial challenge alleging overbreadth, the law is invalidated in *all* applications "because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008) (citation omitted). In arguing overbreadth, Allen is not raising his own claims, but the constitutional claims of *others* not before this Court.

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[8] There is no reason for this Court to consider the facial challenge alleging overbreadth. "It is neither [the courts'] obligation nor within [their] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 128 S. Ct. at 1838. Because the Virginia Act is a state statute, this Court defers to the Virginia court's construction of the statute.[9] *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). As the Virginia Court of Appeals noted, "[t]he plain language of Virginia's child pornography statute limits its application to images that depict actual, real children." *Pet. App.* 14a. Unlike the federal provisions invalidated in *Ashcroft*, the Virginia Act does not apply to virtual child pornography. Rather, "the Virginia child pornography statute contemplates only the images of actual children." *Pet. App.* 14a. *See also Simone*, 63 Va. Cir. at 237 ("The plain language of the Virginia child pornography statute confines its application to images utilizing actual children."). Because the Virginia Act is limited to actual child pornography and because there is no constitutional right to possess actual child pornography, *Osborne*, 495 U.S. at 109-10, there are no unconstitutional applications of the Virginia Act.[10]

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[9] If the state courts have not construed the statute, the proper course is for the federal courts to certify questions to the State's highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77-80 (1997).

[10] The petitioner incorrectly states that the Virginia statute criminalizes the depiction of mere nudity of an underage child. *Pet.* 14. That is incorrect. *Virginia Code* § 18.2-374.1(A) prohibits "*a lewd* exhibition of nudity." (emphasis added). Lewd is a

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The second step of the overbreadth analysis is to determine whether the statute "criminalizes a substantial amount of protected expressive activity." *Williams*, 128 S. Ct. at 1841. Allen has the "heavy burden," *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 207 (2003), "of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (brackets original, citation omitted). There must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Even assuming a statute has unconstitutional applications, "that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell*, 540 U.S. at 207 (internal quotation marks and citation omitted). "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of

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synonym of "lascivious," meaning "a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite." *Pedersen v. City of Richmond*, 254 S.E.2d 95, 98 (Va. 1979).

situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974).

Allen does not—and cannot—identify a single instance where the Virginia Act, as construed by the Virginia courts, is unconstitutional.[11] While he implicitly suggests that a sexually explicit scene involving a child actor is constitutionally protected, *Pet.* 16, *Ferber* forecloses such an argument. *Ferber*, 458 U.S. at 756-65. Moreover, assuming that *Ferber* is limited and the Constitution does protect some sexually explicit scenes involving actual children, "the vast majority of its applications" raise "no constitutional problems whatever" and the statute is not substantially overbroad. *Williams*, 128 S. Ct. at 1844. Therefore, his overbreadth argument fails.

Finally, to the extent one could conceive of some realistic circumstances where the Virginia Act is unconstitutional, any such application may be avoided through case-by-case litigation. *Hicks*, 539 U.S. at 124. "As-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168. Because the statute is constitutional as applied to Allen, there is no need to consider the draconian remedy of declaring the Virginia Act invalid in all applications. When confronted with a statute that is unconstitutional in

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[11] Contrary to Allen's assertions, *Pet.* 15, the Virginia Act does not reach adult actors who appear to be children. *See Pet. App.* 14a (Virginia Act limited to depictions of actual children).

some applications, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

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December 4, 2009

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